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Supreme Court No. 98965-6
Court of Appeals No. 80209-7-I

IN THE WASHINGTON SUPREME COURT

In Re the Welfare of K.D.

***AMICUS CURIAE* BRIEF OF
WASHINGTON COALITION FOR OPEN GOVERNMENT**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae Washington Coalition for Open Government (“WCOG”) is a nonprofit, nonpartisan organization dedicated to promoting and defending the public’s right to know about the conduct of government and matters of public interest. WCOG’s mission is to help foster the cornerstone of democracy: open government, supervised by an informed citizenry. WCOG’s interest in this case stems from its work and advocacy related to fostering and maintaining a transparent and open government. WCOG’s interest in this case further stems from the Washington Supreme Court’s invitation to WCOG to file an *amicus curiae* brief in the matter.

STATEMENT OF THE CASE¹

D.G. is the mother of K.D. The Superior Court of Snohomish County terminated D.G.’s parental rights. Thereafter, D.G. appealed the trial court’s decision to the Court of Appeals for Division I, citing eleven assignments of error. Appellant D.G. titled her appeal “In re Dependency of K.D.” Pursuant to RAP 3.4 and General Order *In re Changes to Case Title*, August 22, 2018, the Court of Appeals of Division I changed the title of the case to “In Re the Welfare of: K.D., Danielle Graves, Appellant v. DCFY, Respondent.”

¹ As to the underlying trial court procedural history, WCOG defers to the statements of the case provided by the parties.

In response, on March 30, 2020, Appellant filed a “Motion to Change Caption and to Use Initials of Parent in Decision.” Appellant argued that under the Rules of Appellate Procedure, the Court of Appeals should not have changed the caption. Appellant also requested that the Court of Appeals use her initials throughout the case.

On March 31, 2020, the Court of Appeals Court Administrator denied Appellant’s motion. The Court Administrator relied on RAP 3.4, and reasoned: “Counsel’s reference to RAP 3.4 omits the second part of the first sentence of RAP 3.4 which states, ‘except that the party seeking review by appeal is called appellant.’ [D.G.] is the Appellant in this case and, therefore, properly designated as such in the title of the case.” Appellant moved to modify the Court Administrator’s decision, but the Court of Appeals declined.

Notably, throughout the motions practice, neither the Appellant nor the Court of Appeals cited to or analyzed the factors set forth in GR 15 and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) or this Court’s more recent articulation as set forth in *Doe G v. Dep’t of Corr.*, 190 Wn.2d 185, 201, 410 P.3d 1156, 1165 (2018).

Appellant filed a Motion for Discretionary Review with this Court. This Court has granted review on the following issue:

Whether in this action to terminate parental rights, court rules and open court principles allowed the Court of Appeals to unilaterally change the case title as used in the trial court to include the mother's name.

On February 9, 2021, this Court invited WCOG to provide an *amicus curiae* brief on this issue. WCOG respectfully submits this brief to assist the Court.

ISSUES ADDRESSED

Whether in this action to terminate parental rights, court rules and open court principles allowed the Court of Appeals to unilaterally change the case title as used in the trial court to include the mother's name.

ARGUMENT²

WCOG's position is that the Court of Appeals did not commit inherent error or abuse its discretion by unilaterally changing the name of the case because the case caption falls within the Court of Appeal's discretion. It is also WCOG's position that any analysis as to whether a party may proceed in anonymity, pseudonymity, or by initialism, should be subject to the GR 15 and *Ishikawa* analyses.

- 1. Washington trial and appellate courts are afforded significant deference to control their dockets and clerical aspects of the cases before them.**

² At the outset, WCOG clarifies that it takes no position on the propriety of the underlying case substantively, including whether the trial court appropriately terminated D.G.'s parental rights. WCOG's position relates exclusively to the issues of open and public court dockets.

“Courts have the inherent authority to control their records and proceedings.” *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966, 969 (1981); *see also State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113, 1114 (2012) (Lower “courts have the inherent authority to control and manage their calendars, proceedings, and parties.”); *Matter of Sealed Affidavits to Search Warrants*, 600 F.2d 1256 (9th Cir. 1979). From statutes to case law, to court rules, Washington law consistently gives individual courts the right to control clerical aspects of the cases before them. *Id.* When the Washington Courts were originally structured, the Legislature explained that the courts’ jurisdiction over a case also conferred the right to direct how the case should proceed, unless the procedure was specifically outlined in statute. RCW 2.28.150 (as amended in 1955 c 38 § 15; originally passed in substantially similar form in 1891 c 54 § 12). Later, the Legislature provided specific examples of this authority, including the power to “provide for the orderly conduct of proceedings before it[.]” RCW 2.28.010(3).

Rule of Appellate Procedure 3.4, titled “TITLE OF CASE AND DESIGNATION OF PARTIES, states:

The title of a case in the appellate court is the same as in the trial court except that the party seeking review by appeal is called an "appellant," the party seeking review by discretionary review is called a "petitioner," and an adverse party on review is called a "respondent."

RAP 3.4 echoes these principles by allowing the Courts of Appeals to exercise discretion in its own cases, specifically regarding case titles. The Court of Appeals for Division I has interpreted RAP 3.4 to mean that the “title of a case in the appellate court” must list “the party seeking review by appeal is called ‘appellant . . .’” Such an interpretation is reasonable.

Further, RAP 3.4 states:

Upon motion of a party or on the court’s own motion, and after notice to the parties, the Supreme Court or the Court of Appeals may change the title of a case by order in said case.

The Court of Appeals may “change the title of a case by order” on its own motion. RAP 3.4. The Court of Appeals believes the case title in dependency should be the name of the appellant. They should have discretion to make that change, regardless of subject, if there is not statutory instruction to the contrary. This Court has held that courts have the right to manage access to court proceedings and party names previously, *see Federated Publ'ns. v. Swedberg*, 96 Wn.2d 133 (1981).

Given that courts have the inherent authority to control their records, proceedings, calendars, and parties, and given that RAP 3.4 gives the Court of Appeals the express authority to change the case title on its own motion, deference should be given to the Court of Appeals to unilaterally change the names of the caption in *any* proceeding. *Cowles Pub. Co.*, 96 Wn.2d at 588; *Gassman*, 175 Wn.2d at 211. The more nuanced issue is whether the Court

of Appeals properly denied Appellant’s motion to change the caption back and allow her to proceed under a pseudonym, given the subject matter of the case. This is addressed below.

2. Whether the Court of Appeals properly grants or denies a motion to proceed with anonymity, pseudonymity, or initialisms, must be reviewed and analyzed through GR 15, *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30 (1982) and *Doe G v. Dep’t of Corr.*, 190 Wn.2d 185 (2018).

The Constitution of the State of Washington states: “Justice in all cases shall be administered openly, and without unnecessary delay.” Wa. Const. art. I, § 10. Washington courts “rely on GR 15 and *Ishikawa*” to “determine whether pseudonymous litigation is appropriate.” *Doe G*, 190 Wn.2d at 198. “Under GR 15, a court record may be sealed if a court enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.” *Id.* at 198–99 (internal quotations and citations omitted). “Moreover, *Ishikawa* requires the court to (1) identify the need to seal court records, (2) allow anyone present in the courtroom an opportunity to object, (3) determine whether the requested method is the least restrictive means of protecting the interests threatened, (4) weigh the competing interests and consider alternative methods, and (5) issue an order no broader than necessary.” *Id.* at 199. “While Washington courts have allowed pseudonymous litigation, in some circumstances this court has still

required a showing that pseudonymity was necessary.” *Id.* at 200. Judicial precedent is clear, pseudonymous litigation *may* be appropriate in some circumstances. The default, however, is open, transparent names. Pseudonymity, anonymity, and initialisms are only appropriate subject to GR 15 and *Ishikawa*. *Id.*

3. Public policy considerations support applying the GR 15 and *Ishikawa* factors to the use of parental pseudonyms in dependency appeals.

The public’s right to open proceedings mandates that the trial court limit closure to rare circumstances. *State v. Bone-Club*, 128 Wn. 2d 254, 906 P.2d 325 (1995). Washington’s *Ishikawa* factors provide long-standing well-established criteria to balance open access to the courts against competing privacy interests. *Ishikawa*, 97 Wn.2d at 37-39. Dependency proceedings should not be exempt from *Ishikawa*. A bright line rule of law prohibiting a court from making an individualized determination as to the need for closure in a given lawsuit, would violate constitutional guarantees of open access to the court. *Allied Daily Newspapers of WA v. Eikenberry*, 121 Wn. 2d 205, 848 P.2d 1258 (1993). However, on the other hand, a bright line rule requiring the sealing of records to protect parent privacy in dependency proceedings would violate GR 15, a rule grounded in protecting open access to the Court. *State v. Parvin*, 184 Wn. 2d 741, 364 P.3d 94

(2015). GR 15 and the *Ishikawa* balancing test should therefore be applied to child dependency appeals.

Applying *Ishikawa* would allow courts to determine whether permitting a parent to proceed anonymously would be in the best interest of the specific child in the specific case or would otherwise undermine the public's rights to know. The *Ishikawa* test is sufficiently flexible to allow for considerations that contemplate the entire family dynamic, not just that of the parent or child such as: the nature of the conduct at issue and whether such conduct warrants government intervention and public condemnation; the child's age and level of maturity; the procedural posture of the hearing; whether sexual abuse is at issue; and the potential for future physical or psychological harm to the child, or other children with whom the parent may associate. For instance, should a father like Joshua Powell have been afforded the right to anonymously to appeal the termination of his parental rights.³ Mr. Powell's parental rights were under governmental scrutiny and oversight after his wife's disappearance where he was the primary suspect.

³ "Report Sealed Info might have helped save Powell kids lives."
<https://archive.sltrib.com/article.php?id=54616208&itype=CMSID>.

When afforded supervised visitation, he locked out the social worker supervisor and blew up his home with the boys and himself inside, killing all three of them. Joshua Powell was a legitimate threat, deserving of public scrutiny as were the Courts that allowed him visitation.

A. Highly Protected Constitutional Interests Warrant Open Public Scrutiny of Governmental Intrusion

The default of using parents' full names, subject to the *Ishikawa* factors, would be in the best interests of “children” broadly by allowing the public to scrutinize elected judicial officers. Given the fundamental liberty interests at stake, there would be few, if any, governmental proceedings of greater public importance to evaluate critically than a dependency proceeding. Child dependency cases require judges to decide the fundamental rights of children and parents, and where conflicting the child’s rights prevail. *In re Dependency of J.A.F.*, 168 Wn. App. 653, 278 P.3d 573 (2012). Fundamental parental rights may only be limited in narrow circumstances. In classic fourteenth amendment liberty analysis, a determination that a party’s constitutional rights have been violated requires “a balancing [of] liberty interests against the relevant state interests.” *Youngberg v. Romeo*, 457 U.S. 307, 321, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). This balancing of interests has been applied in cases involving intimate association rights. *See Winston ex rel. Winston v.*

Children & Youth Servs., 948 F.2d 1380, 1391 (3d Cir. 1991), *cert. denied*, 119 L. Ed. 2d 225, 112 S. Ct. 2303 (1992); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1010 (N.D. Ill. 1989); *Whitcomb v. Jefferson County Dep't of Social Servs.*, 685 F. Supp. 745, 747 (D. Colo. 1987). To determine whether a person's familial association rights have been violated in a dependency case, a court must balance the state's interests in investigating reports of child abuse, and the parent's interests in the familial right of association. The court must consider the interests of the parties applying objective standards of reasonableness to justify governmental intrusion in a given case. *In re PARENTAGE OF C.A.M.A, a minor child, Christian E. Appel, v. Herlinde Appel*, 154 Wn. 2d 52, 109 P.3d 405 (2005).

When Washington's courts decide parental rights based on the "best interests of the child" from the bench, the public needs to know how its elected officials weigh the situation and whether such outcomes show explicit or implicit cultural biases and prejudices known only when the identity of the parents are recognizable. Meaningful scrutiny may only be achieved through public access.

By way of a hypothetical example, allowing two parents, Ashley Smith and Alejandra Santiago (fictional persons) to proceed as "A.S." in their respective appeals, would make it more difficult for the public to scrutinize whether these two proceedings were treated equally or whether

racial or cultural, actual or implicit bias affected the decision. Automatic initialism is contrary to Washington's constitution and comes at a cost.

To point to a more concrete example, it was not long ago that the United States Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901. Congress ended up passing the Indian Child Welfare Act in 1978. But it did not automatically cure the long practice of disproportionately removing Indian children from their families. Hiding and anonymizing parental rights cases would only make it more difficult to monitor and prevent such conduct from continuing.

The court must weigh the individual interests to determine whether the conduct of the governmental actor constituted an undue burden on a parent's associational rights. *See Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 2943 (1990) (familial privacy interests protected against undue state interference); *Roberts v. US Jaycees*, 468 U.S. 609, 617-18 ("choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State"); *Arnold v. Board of Educ. Of Escambia County, ALA*, 880 F.2d 305, 312, (1989) (rights protected against "unjustified interference" from the government). If the action of the court

or governmental actor constitutes an unreasonable intrusion into the associational right, the governmental action may not pass constitutional muster.

Name anonymity allows people to hide what should not in all cases be kept secret. There is nothing inappropriate about public scrutiny that deters against intolerable misconduct like abuse of a child, or government infringement on constitutional interests. Public scrutiny promotes fair and impartial trials. *State v. Love*, 183 Wn. 2d 598, 354 P.3d 841 (2015); *State v. Effinger*, 194 Wn. App. 554, 375 P.3d 701 (2016). Anonymity compromises accuracy and credibility where facts cannot be cross checked through verification of an individual's identity: "[r]eporting the true facts about real people is necessary to obviate any impression that the problems raised in the [report] are remote or hypothetical." *Haynes v Alfred A Knopf, Inc.*, 8 F.3d 1222, 1233 (7th Cir 1993), quoting *Gilbert v Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir 1981). While parents may seek privacy to avoid the discriminatory effects of name publicity, openness of court records prevails as the greater interest where a parent is unable to show suspected adverse events in fact occur. *Hundtofte v. Encarnacion*, 181 Wn. 2d 1, 330 P. 3d 168 (2014) (Order to redact names from list of tenants' party to an unlawful detainer to the tenants' initials due to claimed fear of an inability to obtain housing was not justifiable.). "People who do not desire

the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private." *Haynes*, 8 F.3d at 1232. In *Barron v Florida Freedom Newspapers, Inc.*, the Florida Supreme Court held that state common law required a presumption of openness in all court proceedings. The court stated:

A trial is a public event. What transpires in the court room is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

531 So. 2d 113, 116 (Fla. 1988). People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case. By educating the public, openness also serves to increase public respect for the law.

Although custody awards are not supposed "to be used as punishment for parental misconduct, some jurisdictions appear to have awarded custody for that purpose." Lynn D. Wardle, Christopher L. Blakesley, and Jacqueline Y. Parker, 4 *Contemporary Family Law* § 39:07

at 36 (Callaghan, 1988), citing *Schexnayder v Schexnayder*, 371 S2d 769 (La 1979) (apparently endorsing punishment for past misconduct under the guise of the best interest of the child standard). *See also* James C. Black and Donald J. Cantor, *Child Custody* 3 (Columbia, 1989) (suggesting that some judges may grant custody exclusively to women under the notion that "women raise children and men work").

B. There is No Historical Privacy In Parent Names Where Parenting Is In Dispute

Child custody determinations have historically been decided in forums open to the public. Since the nineteenth century, divorce courts have decided child custody disputes, including disputes with allegations of abuse and neglect. *In re the Welfare of Joseph Michael Gregoire, a minor. Melvin DeVore and Patricia DeVore v. Superior Court of the State of Washington FOR KING COUNTY, JUVENILE COURT*, 71 Wn. 2d 745, 430 P.2d 983 (1967); Mary McDevitt Gofen, *The Right of Access to Child Custody and Dependency Cases*, *The University of Chicago Law Review*, 62:857 (1995) at 867 ft. 64 citing Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* 250-251 (North Carolina, 1985). In 1844, the Supreme Court heard a habeas corpus matter naming the father who sought to have his daughter returned to him and removed from the custody of the named grandmother. *Ex parte Barry*, 43 U.S. 65 (1844). The

Supreme Court also heard and published the corresponding custody dispute by parent name. *Barr v. Mercein and Barry*, 46 U.S. 103 (1847). Washington was publicly hearing and deciding child custody issues by parent name dating back to the late 1800s. *Tierney v. Tierney*, 1 Wash. Terr. 568 (1878); *Rosencrantz v. Territory*, 2 Wash. Terr. 267, 5 P. 305 (1884). The name of a parent whose parental rights may be revoked has not been secret even where the allegations include sexual abuse. *In the Matter of the DEPENDENCY OF A.E.P. and W.M.P., Minor Children, Michael Petcu, Petitioner, vs. DSHS, Respondent*, 135 Wn. 2d 208, 956 P.2d 297 (1998). Thus, historically, parents have had no claim to privacy when their parenting skills have been challenged by one another or by government. Past practice of initializing a child's name should not be extended to the parents of such a child.

C. Open Access Improves Outcomes

The family unit is a fundamental resource of American life that should be nurtured. RCW 13.34.020. Dependency proceedings are secondary to family reunification efforts absent circumstances where a child's right to conditions of basic nurture, health, or safety is jeopardized. RCW 13.34.020.

Anonymity affords a parent and child limited public awareness that can affect the testimony and outcomes. In *Bone-Club*, 128 Wn. 2d at 262,

the Supreme Court was convinced that closing the suppression hearing could lead to differing testimony than what would have been said in closed court.

In *New Jersey Div. of Youth & Family Servs. v J.B.*, the New Jersey Supreme Court held that custody cases should be open to the public and press. The court first found that "[t]he history of civil jurisprudence, like that of criminal law, reveals a tradition of public access." *Id.* The court stated that the historical materials relied on by the plurality in *Richmond Newspapers* applied to civil as well as criminal trials. *Id.* The New Jersey Supreme Court also found that, as with criminal cases, press access to civil cases serves the First Amendment's "core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* The court concluded that this right of access could be overcome only by an important state interest. *Id.* Members of the public, including the press, must be free to make application to the trial court to be permitted to attend DYFS proceedings. *Id.* Confronted with such an application, the court must balance the public's right of access to judicial proceedings against the State's interest in protecting children from the possible detrimental effects of revealing to the public allegations and evidence relating to parental neglect and abuse. *Id.* Recognizing that *J.B.* did not involve any allegations of abuse, but rather related to the father's mental health and capacity to carry

out his duties as a parent, the court held that press access was proper. *Id.* at 270.

- D. Lower courts are in the best position to determine whether proceeding under anonymity, pseudonymity, or initialisms comports with Washington's constitution and *Ishikawa* in each particular case.

Balancing competing interests, particularly constitutional interests, is an area where discretion is of great value. For example, a Pierce County Superior Court was faced with balancing plaintiffs' right of access to courts against defendants' rights to adequate notice when the indigent plaintiffs could not afford to pay a process server to reach the defendant out of state. *Ashley v. Superior Ct. In & For Pierce Cty.*, 83 Wash. 2d 630, 521 P.2d 711 (1974). The Superior Court held that, while the defendant had a constitutional right to adequate notice, the notice could be less than what the Court usually required, delivery by process server, and allowed the indigent plaintiffs to use certified mail in the special circumstance presented. *Ashley*, 83 Wn.2d at 636–37. This Court affirmed that decision, stating that the Superior Court's decision was "within the power and discretion of the court[.]" Access to courts and sufficient notice of proceedings are both integral parts of just adjudication and, by modifying the rules to match the circumstances, the Pierce County Superior Court found a solution that served both interests. The Appellant has a desire for

privacy. The state has legitimate interest in the child's privacy. The public has a legitimate interest in observing dependency and termination proceedings to ensure that justice is served. Balancing these interests is far too individualized for an immutable rule and should be left to the courts to decide on a case by case basis.

Balancing interests is an activity that this court has guided lower courts through on many occasions. In a case very similar to the one at bar, this Court held that the trial court erred by redacting party names because the court did not engage in the proper balancing analysis. *Hundtofte*, 181 Wn. 2d at 6-7. In *Hundtofte*, two defendants to an unlawful detainer action which had settled moved to have their names stricken from the court's records of the settled case because they feared it would impede their future housing opportunities. This Court held that the proper test for balancing the interests of the parties and the interest of the public in access to court information was established in *Ishikawa*, 97 Wn.2d at 37-39, showing once again the value of individualized analysis.

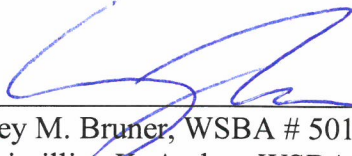
Here, allowing the Court of Appeals to release the names of the appellants in termination cases, while still entertaining motions to use initialisms, pseudonyms, or redactions, strikes the appropriate balance. It ensconces the policy of openness established by the Constitution, and it

allows for the opportunity to modify this decision as exhibited in the notice rulings the Clerk of Court filed in this and similar cases.

CONCLUSION

For the reasons set forth above, this Court should hold that it was not inherent error or an abuse of discretion for the Court of Appeals to unilaterally change the name of the case, as such an action is within its discretion under RAP 3.4. This Court should further hold that any motions to proceed with initialisms, pseudonyms, or other redactions should be subject to the GR 15 and *Ishikawa* analyses.

Respectfully submitted this 29th day of March, 2021.



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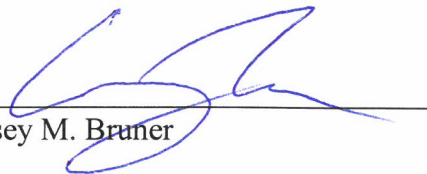
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on March 29, 2021, the foregoing *Amicus Curiae* Brief of Washington Coalition for Open Government was filed with the Washington Supreme Court using the Court's e-filing system, which will automatically provide notice to all required parties.

Executed this 29th day of March, 2021 in Spokane, WA.



Casey M. Bruner

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